

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Lease Available Land located on the Barre-Ellis Transmission Right of Way to Huntington Center Associates, LLC.

Application 03-12-007
(Filed December 5, 2003)

**DECISION GRANTING APPROVAL
UNDER PUB. UTIL. CODE § 851
FOR A LEASE OF UTILITY PROPERTY**

Summary

We grant the unopposed Application of Southern California Edison Company (SCE) for authority to lease available land under Pub. Util. Code §851.¹ The SCE property consists of 5.8 acres located on a portion of SCE's Barre-Ellis transmission right of way in the City of Huntington Beach (Site). The Site is part of the Barre-Ellis 220 kilovolt (kV) system. The lease is sought to permit Huntington Center Associates, LLC (HCA or Lessee) to develop and operate a vehicle parking facility on the Site. The lease will not interfere with SCE's utility obligations and will generate additional revenues to be split between SCE's shareholders and ratepayers under the sharing mechanism approved in prior Commission decisions.

¹ All statutory references are to the Public Utilities Code unless noted otherwise.

Applicable Law

SCE's application is made under § 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public.² Leasing real property on which transmission towers and lines are located is therefore one of the enumerated activities that require approval under § 851.³

The Proposed Lease

The Site is subject to an Option Agreement between SCE and HCA (Appendix A to the Application), dated December 1, 2002. The Site is part of a proposed, 63-acre project that includes redevelopment of an existing mall to create an open-air retail, restaurant and entertainment mall complex. Pursuant

² Section 851 reads, in pertinent part:

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void...

³ As the Commission previously stated: "The language of Section 851 is expansive, and we conclude that it makes sense to read "encumber" in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property." (Decision (D.) 92-07-007, 45 CPUC 2d 24, 29.)

to the Option Agreement, HCA has the right, subject to Commission approval, to lease the Site from SCE for the described uses for a period of 50 years beginning on the date HCA exercises the option. Annual rent begins at \$75,000 in Year 1, increases to \$126,759 in Years 2 through 10, and then increases every five years, reaching \$196,199 in Years 46-50. The lease also grants HCA three five-year renewal options at fair rental value, excluding the value of HCA's improvements.

The Option Agreement provides that HCA's activities must not interfere with the operation of the electric facilities that cross the Site. To that end, HCA is forbidden to use or store hazardous substances, explosives or flammable materials on the Site. Further, any equipment used by HCA on or adjacent to the Site must maintain at all times a clearance of at least seventeen (17) feet from all overhead electrical conductors. HCA must maintain a minimum radius of fifty (50) feet around all tower legs and ten (10) feet around all poles and anchors and provide access roads to the Site that are at least sixteen (16) feet wide and capable of supporting a gross load of forty (40) tons on a three-axle vehicle.

SCE retains various rights under the Option Agreement including the rights to:

- Enter the Site at any and all reasonable times to inspect the property;
- Impose temporary restrictions on HCA's right to enter, occupy and use the Site in order to perform necessary work on the electrical facilities located on the Site; and
- Take back all or part of the leasehold by eminent domain or inverse condemnation.

HCA is also required to:

- Pay all personal property taxes, general or special assessments, or other fees levied against the Site or the improvements to be constructed thereon;
- Obtain all permits and approvals for construction and any zoning changes or use permits required for operation of its business on the Site;
- Maintain appropriate comprehensive general liability, auto liability, and worker's compensation insurance; and
- Indemnify SCE against all liability for damages or injury to persons on the Site except to the extent caused by SCE's negligent or willful misconduct.

Determination of Best Secondary Use

The primary use of facilities located on the Site is the transmission and distribution of electricity in the City of Huntington Beach. SCE's aboveground electric lines crossing the Site, and their associated restrictions and height clearances limit the potential secondary uses. SCE states that its objective has been to select secondary uses for its property that provide the highest revenue consistent with its utility safety and reliability obligations, and with the land uses allowed by the City of Huntington Beach. SCE has determined that the HCA project offers the highest potential revenue. To evaluate the rental potential of the Site, SCE analyzed the rent paid for comparable parking facilities in the Orange County area. SCE believes that the rent it will receive falls within the acceptable market range and is in line with revenues it receives from similar Commission-approved transactions.

Developer Selection

SCE states that it entered into the Option Agreement with HCA because of the company's financial offer, the background and experience of its owners and,

the City of Huntington Beach's strong support for the larger redevelopment project, which HCA is overseeing.

HCA is owned and controlled by J.H. Snyder Company, LLC (J.H. Snyder) and The Ezralow Company, LLC (Ezralow). SCE describes J.H. Snyder as a \$1 billion enterprise, which has been involved in residential and commercial development for more than 50 years. Its projects include The Water Garden, a 1.26 million square foot commercial complex in Los Angeles; the Wilshire Courtyard, a one million square foot office complex; and Coronado Shores in San Diego, a 1463 unit condominium complex consisting of 10 residential towers.

SCE describes Ezralow as a leading California residential and commercial property management and development firm, which has been in business for more than 30 years. It is currently developing the Bella Terra Project in Huntington Beach (the name given to a major part of the entire redevelopment project); a 333,000 square foot storage facility in Baldwin Hills; and a 22-acre redevelopment site with 300,000 square feet of retail space in Pomona.

Environmental Matters

CEQA Compliance

Because California Environmental Quality Act (CEQA) applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the § 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines § 15051(b)).

In this case, the City of Huntington Beach is the Lead Agency. The City's environmental review process and associated documents are functionally

equivalent to the traditional CEQA preparation of an Environmental Impact Report. The Commission is a Responsible Agency for this proposed project. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency environmental documents and findings before acting upon or approving the project. (CEQA Guidelines §15050(b).) The specific activities that must be conducted by a Responsible Agency are contained in CEQA Guidelines §15096.

We have reviewed the City's environmental documents (Appendix B to the Application) for the 63-acre mall redevelopment project, which includes SCE's 5.8 acres. We find these documents to be adequate for our decisionmaking purposes.

Environmental Assessment No. 02-04, dated February 19, 2002, upon which the other documents rely, identifies several significant or potentially significant impacts on the environment (in the areas of geology and soils, hydrology and water quality, air quality, transportation/traffic, utilities and service) but states that because the mitigation measures identified in the document have been added to the project, there will be no significant effect. Accordingly, the Environmental Assessment directs preparation of a mitigated Negative Declaration.

On March 27, 2002, the City Zoning Administrator approved the redevelopment project, subject to the conditions and mitigation measures identified in the Environmental Assessment. On March 28, 2002, the City issued a Notice of Action to the applicant, which includes both the City's "Findings for Approval" and the required mitigation measures for the project. On March 29, 2002, the City issued a Notice of Action regarding the related site plan (Site Plan

Review No. 02-01), which lists both the City's "Findings for Approval" and the "Conditions of Approval." On the same day, the City filed a Notice of Determination (NOD) with the Orange County Clerk. The NOD provides further notice of the City Zoning Administrator's approval of the redevelopment project after preparation of a mitigated Negative Declaration and subject to certain mitigation measures.

We accept the City's findings. We find that the City adopted reasonable mitigations to reduce the significant and potential impacts to less than significant levels and we similarly require implementation of the adopted mitigations as part of our approval.

Treatment of Any Future Environmental Claims

In D.01-05-005 (which modified D.01-01-039) and in D.01-05-004 (which modified D.01-01-043), the Commission clarified the limits of ratepayer responsibility for future environmental claims on leased utility property, as follows:

Should environmental claims, in whole or in part, related to the tenancy or activities of the lessee be made on SCE subsequent to the execution of the lease, SCE shall not seek recovery of any such claims, or defense of such claims, from ratepayers. (D.01-05-005, slip op. p. 3 and Ordering Paragraph 1.)

As SCE recognizes in the Application, this provision is equally applicable here, and should be imposed as a condition of our approval.

Revenue Treatment

All revenues from the proposed lease will be treated as Other Operating Revenue (OOR). In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain of SCE's operating revenues. The sharing mechanism applies to OOR, except for revenues that (1) derive from tariffs, fees

or charges established by the Commission or by the Federal Energy Regulatory Commission; (2) are subject to other established ratemaking procedures or mechanisms; or (3) are subject to the Demand-Side Management Balancing Account.

Under the sharing mechanism, applicable gross revenues recorded from non-tariffed products and services like the proposed lease are to be split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been met. For those non-tariffed products and services deemed “passive” by the Commission, the revenues in excess of the annual threshold are split between shareholders and ratepayers on a 70/30 basis. The Option Agreement and the proposed lease are “passive “ for sharing purposes.⁴

Discussion

As a lease of utility-owned real property, the proposed transaction falls squarely within the requirements of § 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public. The basic task of the Commission in a § 851 proceeding is to determine whether the transaction serves the public interest: “The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.” (D.02-01-058, slip op., p. 7.) We have reviewed the proposed

⁴ See Attachment B to SCE’s Advice Letter 1286-E, which identifies the *Secondary Use of Transmission Right of Ways and Land* and the *Secondary Use of Distribution Right of Ways, Facilities and Substations* as categories of non-tariffed products and services. Advice Letter 1286-E was filed on January 30, 1998, pursuant to Rule VII.F of the Affiliate Transaction Rules contained in Appendix A of D.97-12-088.

agreement and find it does not interfere with SCE's operation or affect its ability to provide service to its customers. In other contexts, we have defined "productive" activities as those that lead to a measurable benefit to ratepayers. Because ratepayers will receive 30% of the gross revenue from the transaction without incurring any measurable increased costs, we find that the property is being "used for other productive purposes" and accordingly the proposed Lease is in the public interest and the Application should be approved.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Procedural Background; Categorization

SCE filed this application on December 5, 2003. No protests were filed. SCE filed a supplement to the application, at the request of the ALJ, on January 27, 2004. The Assigned Commissioner's scoping memo, issued on January 30, 2004, confirmed the determination of Resolution ALJ 176-3125 that this is a ratesetting proceeding and that no hearings are necessary.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Jean Vieth is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In order for HCA to construct its facilities on the Site, which is part of a larger redevelopment project, a lease from SCE is required.
2. Lease of the Site to HCA is consistent with the current uses of the related SCE properties.

3. The lease and associated construction will not impair SCE's ability to provide service to the public.

4. The City of Huntington Beach is Lead Agency under CEQA for the proposed redevelopment project.

5. In approving the proposed project, the City of Huntington Beach adopted a mitigated Negative Declaration making mitigation measures a condition of approval.

6. On March 29, 2002, a Notice of Determination was filed with the County Clerk finding that with the adopted mitigations, the project will not have a significant effect on the environment.

7. The Commission is a responsible agency under CEQA and has reviewed the City's environmental documents.

8. All revenue from the lease in excess of a Commission-established threshold will be treated as OOR and shared 70/30 between SCE and its ratepayers, pursuant to D.99-09-070.

9. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. Approving the requested lease is in the public interest.

2. We find that the City's environmental documents are adequate for our review and decisionmaking purposes.

3. We find that the City adopted reasonable mitigation measures to reduce potential environmental impacts to less than significant levels. We will adopt the mitigation measures as part of our approval.

4. This decision should be effective today in order to allow HCA to expeditiously enter into the lease with SCE.

O R D E R

IT IS ORDERED that:

1. The Application of Southern California Edison Company (SCE) for authority to lease a portion of its Barre-Ellis transmission Right of Way to Huntington Center Associates, LLC pursuant to the December 1, 2002 Option Agreement is granted, subject to the further provisions of Ordering Paragraphs 2-4.
2. All revenue from the lease shall be treated as Other Operating Revenue subject to the sharing mechanism set forth in Decision 99-09-070.
3. Should environmental claims, in whole or in part, related to the tenancy or activities of the lessee be made on SCE subsequent to the execution of the lease, SCE shall not seek recovery of any such claims, or defense of such claims, from ratepayers.
4. SCE shall notify the Director of the Commission's Energy Division in writing of any amendment, extension or termination of the lease agreement within 30 days after such amendment, extension or termination is executed.
5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.